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# JUDICIAL DECISION-MAKING

## VOLUME I

Fall 2014

Professor Benjamin Alarie  
Professor Andrew Green

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# **JUDICIAL DECISION-MAKING**

## **VOLUME I**

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**Judicial Decision-Making (LAW466H1F)**  
**First Term, 2014-2015**

Professors Benjamin Alarie and Andrew Green

Wednesdays 10:30 a.m. to 12:20 p.m.

Northrup Frye Hall, 119

**Course Description**

Why do judges decide cases the way they do? Some argue judges primarily rely on legal factors to make their decisions while others contend that judges decide at least in part on their own policy preferences either directly or indirectly. More recently examinations of how judges decide have built in broader ranging assumptions about judges seeking to avoid work or appease particular audiences with their decisions. How judges actually decide is central to discussion of a range of topics including how judges are appointed, how cases come before the courts, why judges dissent, whether particular courts act collegially or not and the importance of interveners. We will explore the theories of how judges decide and the empirical evidence from Canada, the US and other countries related to these and other topics. While some experience with empirical analysis would be helpful, it is not required.

**Evaluation**

Each student is responsible for circulating a reaction memorandum of up to 500 words for two classes of their choice. These memoranda will count towards participation (20%). In addition, each student will be responsible for a 5,000-word essay (the word count includes all footnote text) on an issue of their choosing (80%).

**Topics and Readings**

***September 3: Course Overview***

***September 10: Empirical Legal Studies and Inference***

Lee Epstein, William M. Landes and Richard A. Posner, *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice* (Cambridge, MA: Harvard University Press, 2013), 17-24.

Course package: pp. 7-14

Lee Epstein and Gary King, “The Rules of Inference” (2002) 69 *University of Chicago Law Review* 1-133.

Course package: pp. 15-147



### ***September 17: How Judges Decide I***

Lon Fuller, "American Legal Realism" (1934) 82(5) *University of Pennsylvania Law Review* 429.

Course package: pp. 148-181

Steven M. Feldman, "The Rule of Law or the Rule of Politics? Harmonizing the Internal and External Views of Supreme Court Decision Making" (2005) 30(1) *Law & Social Inquiry* 89.

Course package: pp. 149-228

Fred Schauer, "Formalism" (1988) 97(4) *Yale Law Journal* 509.

Course package: pp. 229-268

Matthew C. Stephenson, "Legal Realism for Economists" (2009) 23(2) *Journal of Economic Perspectives* 191.

Course package: pp. 269-289

### ***September 24: How Judges Decide II***

Lee Epstein and Tonja Jacobi, "The Strategic Analysis of Judicial Decisions" (2010) 6 *Annual Review of Law and Social Science* 341.

Course package: pp. 290-307

Richard Posner, "Judicial Behavior and Performance: An Economic Approach" (2004) 32 *Florida State University Law Review* 1259.

Course package: pp. 308-328

Lee Epstein, William M. Landes and Richard A. Posner, The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice (Cambridge, MA: Harvard University Press, 2013), 25-50.

Course package: pp. 329-354

### ***October 1: US Supreme Court***

Denis Steven Rutkus, “Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate” (July 6, 2005) CRS Report for Congress.

Course package: pp. 355-407

Andrew D. Martin and Kevin M. Quinn, “Assessing Preference Change on the US Supreme Court” (2007) *Journal of Law, Economics, and Organization* 1-21.

Course package: pp. 408-428

Jeff Yates et al., “Judicial Ideology and the Selection of Disputes for US Supreme Court Adjudication” (2013) 10(4) *Journal of Empirical Legal Studies* 847-865.

Course package: pp. 429-447

### ***October 8: Supreme Court of Canada***

Matthew E. Wetstein, C.L. Ostberg, Donald R. Songer and Susan W. Johnson, “Ideological Consistency and Attitudinal Conflict: A Comparative Analysis of the U.S. and Canadian Supreme Courts” (2009) 42(6) *Comparative Political Studies* 763-792.

Course package: pp. 448-477

Benjamin Alarie, Andrew Green, and Edward Iacobucci, “Panel Selection on High Courts” (2014) Working Paper, forthcoming in the *University of Toronto Law Journal*.

Course package: pp. 478-516

### ***October 15: UK Supreme Court***

Chris Hanretty, "Lumpers and Splitters on the United Kingdom Supreme Court" (August 13, 2013), working paper.

Course package: pp. 517-543

TT Arvind and Lindsay Stirton, "Lawyers and the Legal Model: Judicial Ideology, Judicial Professionalism and Institutional Strategy Among the Law Lords" (May 14, 2012), working paper.

Course package: pp. 544-596

Lorne Neudorf, "Intervention at the UK Supreme Court" (2013) 2(1) Cambridge Journal of International and Comparative Law 16.

Course package: pp. 597-613

### ***October 22: Israeli Supreme Court***

Theodore Eisenberg, Talia Fisher, Issi Rosen-Zvi, "Does the Judge Matter? Exploiting Random Assignment on a Court of Last Resort to Assess Judge and Case Selection Effects" (2012) 9(2) *Journal of Empirical Legal Studies* 246.

Course package: pp. 614-658

David Gliksberg, "Does the Law Matter? Win Rates and Law Reforms" (2014) 11(2) *Journal of Empirical Legal Studies* 378.

Course package: pp. 659-688



### ***October 29: Indian Supreme Court***

Nick Robinson, “Structure Matters: The Impact of Court Structure on the Indian and US Supreme Courts” (2013) 61 *American Journal of Comparative Law* 173.

Course package: pp. 689-724

Robinson *et al*, “Interpreting the Constitution: Supreme Court Constitution Benches Since Independence” (2011) 46(9) *Economic & Political Weekly* 27.

Course package: pp. 725-729

### ***November 12: Ideology and High Courts***

David L. Weiden, “Judicial Politicization, Ideology, and Activism at the High Court of the United States, Canada, and Australia” (2011) 64(2) *Political Research Quarterly* 335.

Course package: pp. 730-742

Keren Weinshall-Margel and Udi Sommer, “Comparative Attitudinal Measure (CAM): A Cross-National Scale for Judicial Decision Making” (2014) working paper.

Course package: pp. 743-779

### ***November 19: Collegiality and Norms***

Paul H. Edelman, David E. Klein, and Stephanie A. Lindquist, “Consensus, Disorder and Ideology on the Supreme Court” (2012) 9(1) *Journal of Empirical Legal Studies* 129.

Course package: pp. 780-799

Benjamin Alarie and Andrew Green, “The Prospect of Gaming on High Courts” (2013) working paper.

Course package: pp. 800-850

### ***November 26: Designing the Optimal High Court***

Benjamin Alarie and Andrew Green, “Commitment and Cooperation on High Courts” (July 28, 2014), working draft of chapter 1 of *Commitment and Cooperation on High Courts* (forthcoming with Oxford University Press).

Course package: pp. 851-882